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MAR 8 PAGE 2

March 4, 1983

Mr. William Gullickson
Office of the Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Re: No. 82-1202; Steere Tank Lines, Inc. v. Interstate Commerce Commission

Dear Mr. Gullickson:

Transmitted herewith are the orders and decisions of the Interstate Commerce Commission in Docket No. MC-121794 (Sub-No. 7), James Wilkett, d/b/a Wilkett Trucking Company, referred to in the Respondents' brief at Footnote 2, Page 4.

Sincerely yours,

Hugh T. Matthews

Hugh T. Matthews

HTM/mj

cc: Rex E. Lee, Solicitor General
John Broadley, Esq.
Henri F. Rush, Esq.
Cecelia E. Higgins, Esq.

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SERVICE DATE

MAY 20 1981

FEC

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-121794 (Sub-No. 7)

JAMES WILKETT, D/B/A WILKETT TRUCKING COMPANY
(Stigler, OK)

Decided May 11, 1981

The application in this proceeding was published in the Federal Register on April 9, 1981, and protests are due May 26, 1981. Information relating to applicant's fitness has been brought to the attention of the Commission. The proceeding will therefore be designated for oral hearing, and on our own motion, the Office of Consumer Protection will be directed to participate.

It is ordered:

The proceeding is designated for oral hearing at a time and place to be fixed.

The Office of Consumer Protection is directed to participate in this proceeding for the purpose of developing the record on the issue of applicant's fitness.

By the Commission, Acting Chairman Alexis, Commissioners Gresham, Clapp, Trantum, and Gilliam.

(SEAL)

Agatha L. Mergenovich
Secretary

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INTERSTATE COMMERCE COMMISSION

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DECISION

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SERVICE DATE
SEP 29 1981

No. MC-121794 (Sub-No. 7F)

JAMES WILKETT, D/B/A WILKETT TRUCKING COMPANY
- EXTENSION - OKLAHOMA AND TEXAS
(Stigler, OK)

Decided: September 22, 1981

John J. McMackin, Jr., Esquire, Robert C. Bamford, Esquire, and Ed Edmondson, Esquire for Applicant.

Ann P. Van Gaasbeck, Esquire and Simon W. Oderberg, Esquire for the Office of Consumer Protection.

By William A. Shue, Administrative Law Judge:

By an appropriately filed application, James Wilkett d/b/a Wilkett Trucking Company (Wilkett) seeks a certificate authorizing operation as a common carrier by motor vehicle over irregular routes, transporting coal and coal products between points in Oklahoma and Texas. By order dated May 11, 1981, the Commission ordered the proceeding to be designated for oral hearing and directed the Office of Consumer Protection (OCP) to participate in the proceeding for the purpose of developing the record on the issue of applicant's fitness. The matter was assigned to the undersigned and an oral hearing was held in Muskogee, OK on August 11, 1981. Appearances were made on behalf of applicant and the Office of Consumer Protection. Briefs were filed by both parties and full consideration has been given to matters presented on them.

FINDINGS OF FACT

On February 12, 1981, Mr. James D. Wilkett, applicant in this proceeding, was convicted of conspiracy to distribute a controlled substance (dilaudid) and given a sentence of 15 years' confinement to the federal correctional institution at El Reno, Oklahoma. Mr. Wilkett commenced serving his sentence on February 26, 1981. Four days before he entered prison James Wilkett d/b/a Wilkett Trucking Company filed the application at issue. The application was submitted by James D. Wilkett as sole proprietor, and was supported by Great National Corporation - Nevada; Randall & Blake, Inc., an Oklahoma corporation; and Westhoff Brothers, Inc., a Kansas corporation, all of whom are coal producers.

Testimony at the hearing consisted primarily of the presentation of prepared statements. Two shippers were present: Mr. John Heatherly, President of Heatherly Mining, Inc., and Mr. Murray A. Bennett, Supervisor of Davis Coal Corporation's coal operations. These two supporting shippers use Wilkett Trucking virtually exclusively and expressed both satisfaction with the current level of service and a desire to expand their relationship with the carrier. As producers of large amounts of coal, these shippers require large numbers of trucks available for loading in coordination with production. Wilkett Trucking equipment was stated to be both reliable and available when needed.

Mr. Jerry D. Jackson, Chairman of The Board and President of The First National Bank of Stigler, Oklahoma, testified that applicant has borrowed regularly from his bank since May 1978. The applications were made by Mr. Wilkett and his wife, Gladys. Loan payments are made regularly. Mr. Jackson expressed the opinion that Wilkett Trucking Company is in sound financial condition and is creditworthy.

Mr. J. D. Snow, a local businessman and pastor of New Hope Church in Stigler, Oklahoma, where the carrier is located, testified as to the applicant's good business reputation. He also testified as to the good character of Mr. Wilkett's wife, as well as that of Mr. Davey Wilkett and Gwen (Gwendolyn J.) Overlease, two of applicant's children who are involved in the operation of the carrier. No testimony was offered relating directly to the personal character of Mr. James D. Wilkett.

Wilkett Trucking Company's program for compliance with DOT safety regulations, ICC accounting regulations and other pertinent statutes and regulations was detailed by Mr. Clifford L. Phillips, former District Supervisor for the Commission. Mr. Phillip's became the carrier's regulatory compliance supervisor on July 1, 1981. At the time, ICC and DOT regulations were explained to carrier personnel and a program instituted to insure compliance. A visit by Mr. Phillips on August 5th revealed efforts had been and were being made to implement the compliance program. The next compliance survey to be conducted by Mr. Phillips will take place in November.

The remaining witnesses were members of the Wilkett family involved in current operations. Two of Mr. James D. Wilkett's daughters, Gwendolyn J. Overlease and Connie M. Weatherford, conduct much of the recordkeeping and office paperwork, including that involved with maintenance of the compliance program. Mrs. Gladys Wilkett shares general supervisory and dispatching duties with applicant's son Mr. Davey Wilkett.

Mr. Davey Wilkett is primarily responsible for the daily management and operations of the carrier. Before his father went to prison, the son managed the business during his father's absences for vacation or illness. Since Mr. James D. Wilkett began serving his sentence on

February 26, 1981, Mr. Davey Wilkett has assumed the position of general manager responsible for general business decisions, traffic management, supervision of operations, and maintenance supervision.

However, Mr. James D. Wilkett has not withdrawn from the active daily management of Wilkett Trucking Company. He calls his son daily. Mr. Davey Wilkett testified that these telephone calls deal with all aspects of the business including such subjects as the number of trucks that have become disabled. Mr. James D. Wilkett continues to make management decisions.

Furthermore, the applications and testimony indicate that Wilkett Trucking Company is a sole proprietorship owned by Mr. James D. Wilkett individually. Mr. Davey Wilkett, however, stated that in his opinion his father and mother were co-owners. Witness Jerry G. Jackson, the banker, testified that applicant applied for the loans, but that both husband and wife had signed the applications. This evidence is not a rebuttal of applicant's sole ownership, but rather a reflection of the fact that a family business normally includes an investment of time, credit, and effort by all members of the family, particularly the spouse. Mrs. Gladys Wilkett was not shown to have an ownership interest in the carrier.

Evidence was presented by the Office of Consumer Protection verifying the federal felony conviction of Mr. James D. Wilkett for violation of Title 21 U.S.C. § 846 (conspiring to distribute a Section II narcotic substance to wit: dilaudid). Although the conviction is on appeal, Mr. Wilkett has been denied appeal bond and did not attend the hearing.

Discussion and Conclusions

Under the applicable provision of the Interstate Commerce Act, 49 U.S.C. 10922(b)(1), the "Commission shall issue a certificate to a person authorizing that person to provide transportation . . . if the Commission finds:

> "(A) that the person is fit, willing and able to provide the transportation . . .; and
>
> "(B) on the basis of evidence presented by persons supporting the issuance of the certificate that the service proposed will serve a public purpose, responsive to a public demand or need;
>
> "unless the Commission finds, on the basis of evidence presented by persons objecting to the issuance of a certificate, that the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity."

Fitness to conduct the transportation requires not only physical capability, but more importantly, the ability to conduct the transportation in accord with the standards set out in law and regulation. There is no assumption of fitness implicit in the fact that an applicant already holds a certificate. Lieberman, 48 M.C.C. 399, 402 (1948). It is well settled that an applicant must establish his fitness to conduct a proposed operation regardless of whether or not he has previously been found fit to conduct other operations and had been granted a certificate authorizing such operations. Trioli, 53 M.C.C. 212, 215 (1951). The applicant has the burden of refuting the import of past illegal conduct in order to prove fitness. See Kroblin Refrigerated Express, Inc. v. United States, 197 F. Supp. 39 (N.D. Iowa, 1961); Fournier's Express, Inc. Ext. - Hartford, Conn., 108 M.C.C 589 (1969); and Jones - Common Carrier Application, 96 M.C.C. 100 (1964). When the Commission's Office of Consumer Protection challenges the carrier's fitness, the latter's burden does not shift since it is the proponent of an order which requires a finding of fitness to be made. St. Johnsbury Trucking v. United States, 326 F. Supp. 938 (D.C. VT., 1971); Radke (O.C.) - Various Commodities, 113 M.C.C. 89 (1971); Eagle Motor Lines - Lincoln, 107 M.C.C. 499 (1968).

As well established as the principle of fitness is, there is no inflexible formula which must be followed in making the determination. Each case must be decided on the facts presented, due consideration being given to all facts and circumstances. Chicago Exp., Inc. - Purchase - Whippett Motor Lines, 75 M.C.C. 531, 535 (1958).

The primary objection to fitness presented is the federal felony conviction of applicant occurring immediately prior to the filing of the application at issue. OCP contends that this conviction, while not directly related to violations of the Act or Commission regulations, is clearly indicative of a total indifference toward the requirements of law. In essence, the argument is that applicant's character has been shown to be other than that of a law abiding citizen, and that applicant is therefore neither fit, willing, or able to comply with the Interstate Commerce Act and Commission regulations.

The relevance of the applicant's character was discussed in Professional Driver Services, Inc. v. I.C.C., 376 F. Supp. 536 (D.C. Tenn, 1974). The court, in its review of a Commission decision, stated, ". . . [N] derogatory proof was introduced concerning the business activities of plaintiff, plaintiff's president, or the companion business owned by him (Drive-U-Service, Inc.). No evidence was introduced which would show any business deficiency, moral or character deficiency, or failure to satisfactorily perform service in plaintiff's operations." It is implicit, if not explicit, that character deficiency in the form of a showing that applicant is a convicted felon is both relevant and pertinent to the issue of fitness to comply wih the Act and the Commission's regulations.

While it is generally true that findings of unfitness are based upon past violations of the Act or regulations, the Commission is not limited by statute or regulation to consideration of only that type of evidence. The Commission may consider any evidence relevant to applicant's ability to act in a lawful manner. In Jones, supra, the applicant was charged and convicted of four counts of unauthorized transportation. Applicant argued that his conviction on criminal charges paid his debt to society and thus that his unlawful operations should not be considered. The Commission responded, "The primary purpose of the fitness provision of the act is to protect the public from carriers whose conduct demonstrate an unwillingness to operate in accordance with the requirements of regulation . . . . . [A]pplicant has demonstrated a flagrant disregard for the law. "The applicant was found not fit and the application was denied.

During the Wilkett hearing, applicant's representatives attempted to separate the fitness of the carrier itself from the fitness of Mr. James D. Wilkett. This separation is impossible. Mr. Wilkett declared himself under oath in the application to be "owner by sole proprietorship" and "engaged full-time in the management and operations of the company." The evidence presented does not negate these statements as to ownership or management. It would be unrealistic to consider him wholly separate and apart from his status as a convicted felon, or to disassociate his status either from the public interest which dictated his confinement. Mr. James D. Wilkett is James Wilkett d/b/a Wilkett Trucking Company. Mr. James D. Wilkett is also a convicted felon. His conviction is nearly instant in time to the filing of the application and thus not so distant in time as to be stale. Therefore, this conviction clearly demonstrates an inability by applicant to comply with the law.

Ultimate Findings And Order

Upon consideration of the evidence, the briefs, and applicable law, it is found that the applicant has failed to establish that he is fit, properly to conduct the proposed operations and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder. The denial of this application will not significantly affect either the quality of the human environment or conservation of energy resources. The application should be denied.

It is therefore unnecessary, in light of the above findings, to consider the public convenience and necessity question and the Administrative Law Judge does not intend to discuss it. See Berger Common Carrier Application, 119 M.C.C. 894, 896 (1974), wherein it was said: "A finding of fitness is therefore, a prerequisite to a grant of motor carrier operating authority. This determination may not in turn be based upon the finding that the proposed service is required by the public. The findings concerning fitness should be based on evidence

concerning applicant alone, and not on how strong a case has been presented by the supporting shippers or protestants.

It is therefore ORDERED:

That the application of James D. Wilkett d/b/a Wilkett Trucking Company be, and it is hereby, denied;

Dated at Washington, D.C., this 22nd day of September, 1981.

By the Commission William A. Shue, Administrative Law Judge.

William A. Shue

(SEAL)

JAMES H. BAYNE
Acting Secretary

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INTERSTATE COMMERCE COMMISSION

SERVICE DATE
DEC 8 1981

DECISION

No. MC-121794 (Sub-No. 7)

JAMES WILKETT, D/B/A WILKETT TRUCKING COMPANY-EXTENSION
OKLAHOMA AND TEXAS
(Stigler, OK)

Decided: December 2, 1981

By an appropriately filed application, James D. Wilkett, doing business as Wilkett Trucking Company, seeks a motor carrier certificate authorizing transportation of coal and coal products between points in Oklahoma and Texas. By decision of the Commission dated May 11, 1981, the Office of Consumer Protection was directed to participate to develop the record with respect to the fitness of the applicant and the proceeding was assigned for oral hearing. There were no protestants to the application.

The Administrative Law Judge denied the application after determining that applicant's recent felony conviction demonstrated an inability by applicant to comply with the law and thus warranted finding that he had failed to establish that he is fit, properly to conduct the proposed operations and to conform to the requirements of the Commission's rules and regulations thereunder. Applicant has appealed and Office of Consumer Protection has replied.

We have considered the record in this proceeding and find the Administrative Law Judge's statement of facts to be substantially correct in all material respects. As modified and supplemented here, we adopt it as our own. Certain facts will be summarized to the extent necessary for clarity of discussion. Our conclusions differ from those reached by the Administrative Law Judge. It is our opinion that the applicant has demonstrated his fitness to conduct the proposed operation at the present time, but that the authority granted should provide for further appraisal of fitness within the next 2 years. Since the record otherwise amply warrants granting the authority as sought, we reopen the proceeding on the existing record to grant the application subject to a limitation requiring evaluation of fitness evidence to be submitted by applicant within 2 years.

Factual Background

Pursuant to existing authority, applicant transports coal from certain Oklahoma counties to certain Texas counties. Applicant's proposal to consolidate and expand its existing authority is supported by two shippers and the evidence warrants a finding that the proposed operation will serve a useful public purpose, responsive to a public demand or need. Since the application is unopposed except as to fitness, we will not discuss the evidence of need in any detail.

This proceeding was set for oral hearing with Office of Consumer Protection participation on the issue of applicant's fitness because it came to the Commission's attention that applicant had been convicted of a felony shortly before filing this aplication. Evidence submitted at the hearing establishes that on February 12, 1981, Mr. James D. Wilkett (applicant) was convicted of conspiracy to distribute a controlled substance (dilaudid) and given a sentence of 15 years' confinement to the federal correctional institution at El Reno, OK. Even though his conviction was appealed, Mr. Wilkett commenced serving his sentence on February 26, 1981.

There is no indication on the record that the activities which warranted Mr. Wilkett's conviction were in anyway related to the trucking operation or that he has violated laws and regulations applicable to motor carrier operations. Existing shippers supporting the application considered applicant's equipment to be both reliable and available when needed. The applicant's banker testified favorably concerning the financial condition of the trucking company. A local businessman and pastor in Stigler, OK, where the carrier is located, testified as to the applicant's good business reputation. He also testified as to the good character of Mr. Wilkett's wife, as well as that of Mr. Davey Wilkett and Mrs. Gwendolyn J. Overlease, two of applicant's children who are involved in the operation of the carrier. No testimony was offered relating directly to the personal character of Mr. James D. Wilkett.

Wilkett Trucking Company's program for compliance with Department of Transportation (DOT) safety regulations, Commission accounting regulations, and other pertinent statutes and regulations, was detailed by Mr. Clifford L. Phillips, former District Supervisor for the Commission. Mr. Phillips became the carrier's regulatory compliance

supervisor on July 1, 1981. At the time, Commission and DOT regulations were explained to carrier personnel and a program instituted to insure compliance. A visit by Mr. Phillips on August 5, 1981, revealed efforts had been and were being made to implement the compliance program. The next compliance survey to be conducted by Mr. Phillips was to take place in November 1981.

Other witnesses were members of the Wilkett family involved in current operations. Two of Mr. James D. Wilkett's daughters, Mrs. Gwendolyn J. Overlease and Mrs. Connie M. Weatherford, conduct much of the recordkeeping and office paperwork, including that involved with maintenance of the compliance program. Mrs. Gladys Wilkett, applicant's wife, shares general supervisory and dispatching duties with applicant's son, Mr. Davey Wilkett.

Mr. Davey Wilkett is primarily responsible for the daily management and operations of the carrier. Before his father went to prison, the son managed the business during his father's absences for vacation or illness. Since Mr. James D. Wilkett began serving his sentence, Mr. Davey Wilkett has assumed the position of general manager responsible for general business decisions, traffic arrangement, supervision of operations, and maintenance supervision. Mr. James D. Wilkett calls his son daily. Mr. Davey Wilkett testified that these telephone calls deal with all aspects of the business including such subjects as the number of trucks that have become disabled.

Discussion and Conclusions

A finding of fitness is a prerequisite to a grant of authority under the applicable provision of the Interstate Commerce Act, 49 U.S.C. 10922(b)(1). There is very little precedent concerning consideration of nontransportation related misconduct in determining the fitness question, and, consequently, the criteria applicable to misconduct in fitness cases are usually stated in terms assuming the misconduct is transportation related. A typical statement of such criteria appears in Tennessee Cartage Co., Inc., Extension - Georgia, 128 M.C.C. 819, 821 (1978).

> In determining an applicant's fitness, consideration must be given to the nature and extent of an applicant's misconduct, if any, and any mitigating circumstances; whether an applicant's mis-

> conduct represents a flagrant and persistent disregard of the provisions of the act and our rules and regulations; whether an applicant has made an effort to correct past mistakes; and whether applicant is willing and able in the future to comport its operations to the requisite standards. Fitness must be determined on the basis of the unique facts and circumstances in each proceeding. Melton Truck Lines, Inc., Extension-Roofing, 88 M.C.C. 723 (1962); L & M Express Co., Extension-Crewe, Va., 106 M.C.C. 334 (1968); and Johnny Brown's Inc., Extension-Winchester, Va., 111 M.C.C. 905 (1970). These considerations are critical for otherwise a denial on fitness grounds would be merely a punitive measure instead of being properly aimed at protecting the shipping public and others from continuing misconduct by a carrier.

It is clear that past willful misconduct is not, as a matter of law, sufficient to bar a grant of authority. It may be considered as an element in assessing the applicant's present and prospective fitness. Armored Carrier Corporation v. United States, 260 F. Supp. 612, 615 (E.D. NY 1966). We note first that applicant's misconduct has not been shown to relate in anyway to his existing or proposed trucking operations and cannot be considered flagrant and persistent disregard of transportation related laws or regulations. It is also clear that his company is now being managed in such a manner as to insure that its operations will be in compliance with the laws, rules, and regulations governing interstate motor carriers. The Commission responsibilities in considering fitness of a motor carrier applicant are not directed toward punishment of misconduct, whether transportation related or not, but are to protect the public and others from continuing misconduct by a carrier. Without in anyway condoning applicant's misconduct in other areas, we are satisfied that he has demonstrated that his trucking operation is being conducted in compliance with applicable law and regulations. In order to ensure that such compliance continues into the future, we will provide applicant the opportunity to submit additional evidence of compliance within the next 2 years. Applicant's appeal indicates that he would not object to such a requirement and that he welcomes such an opportunity.

We find:

Performance by applicant of the service described in the appendix will serve a useful public purpose, responsive to a public demand or need. Applicant is fit, willing, and able properly to perform the granted service and to conform to the statutory and administrative requirements. This action will not significantly affect either the quality of the human environment or conservation of energy resources. An appropriate certificate should be granted.

It is ordered:

The decision of the Administrative Law Judge dated September 22, 1981, is vacated to the extent it is inconsistent with this decision.

The application is granted to the extent set forth in the appendix. Operations may begin only following the service of a certificate and upon compliance with the following requirements set forth in the Code of Federal Regulations: insurance (49 CFR 1043), designation of process agent (49 CFR 1044), and tariffs (49 CFR 1310).

This decision will take effect 15 days from its date of service.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Clapp, Gresham, and Taylor. Commissioner Taylor did not participate.

(SEAL)

Agatha L. Mergenovich
Secretary

NOTICE: This proceeding is now administratively final within the meaning of 49 CFR 1101.2(f) of the Commission's regulations; and, in accordance with the provisions of Section 558(c) of the Administrative Procedure Act, any corresponding temporary authority expires and operations thereunder must cease upon the effective date of this decision, except that to the extent permanent authority is granted in this proceeding (and if partial, only to that extent) the corresponding temporary authority or portion thereof will continue in effect until a certificate or permit is issued and becomes effective. The filing of any further pleadings in this matter will not stay the expiration of the temporary authority related to the denied portion of the sought permanent authority.

APPENDIX

Authority to conduct the following operations will be issued in an appropriate document. This decision does not constitute authority to operate.

To operate as a common carrier, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting coal and coal products between points in Oklahoma and Texas. This authority will continue for a period ending 2 years from the date of certificate issuance. Within the 3 months prior to the end of the 2-year period, the carrier may request permanent extension of the authority by filing an appropriate pleading requesting reopening of the proceeding to receive tendered evidence of continuing fitness, willingness, and ability to provide the authorized operations in compliance with all applicable laws and regulations governing motor carrier operations. Unless the carrier submits acceptable evidence of continuing fitness, this certificate will terminate at the end of the 2-year period.

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SERVICE DATE

AUG 17 1982

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-121794 (Sub-No. 7)

JAMES WILKETT, D/B/A WILKETT TRUCKING COMPANY-EXTENSION-OKLAHOMA AND TEXAS
(Stigler, OK)

Decided: August 13, 1982

Upon examination of the record and the decision in this proceeding, we believe that this matter should be reopened and reconsidered. 49 U.S.C. 10322(g).

It is ordered:

Subject to the approval of the United States Court of Appeals for the District of Columbia Circuit in James Wilkett d/b/a Wilkett Trucking Company v. Interstate Commerce Commission and United States, No. 82-1373, this proceeding is reopened for further consideration on the present record.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison. Chairman Taylor was absent and did not participate.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

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SERVICE DATE
JAN 25 1983

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-121794 (Sub-No. 7)

JAMES WILKETT, D/B/A WILKETT TRUCKING COMPANY, EXTENSION - OKLAHOMA AND TEXAS
(Stigler, OK)

Decided: January 18, 1983

By our decision of August 13, 1982, we reopened this proceeding for reconsideration on the present record subject to the approval of the United States Court of Appeals for the District of Columbia Circuit. The Court granted our motion for voluntary remand on September 16, 1982.

Wilkett Trucking Company applied for motor common carrier authority to transport coal and coal products between points in Oklahoma and Texas. The application was unopposed and the evidence supported a need for the scope of the proposed service. By an order of the Commission, however, the Office of Compliance and Consumer Assistance (OCCA) was directed to participate in the proceeding to develop the record on applicant's fitness.

At the oral hearing, OCCA attorneys presented evidence that James D. Wilkett, the owner of Wilkett Trucking, was in federal prison on conviction of conspiracy to distribute drugs. Wilkett began serving his 15-year sentence four days after the application was filed with the Commission.1/ OCCA attorneys argued that Wilkett Trucking is a sole proprietorship owned and managed by James Wilkett. They contended that because of the close relationship between the company and Wilkett, Wilkett's personal fitness could not be separated from his company's fitness.

Several witnesses testified in favor of a grant of authority to Wilkett Trucking. Wilkett's son, David Wilkett, testified that he had been responsible for daily management of the business since his father's incarceration. He stated that the company is a family-run business and owned jointly by Wilkett and his wife. David Wilkett acknowledged that his father calls him from prison daily and they discuss business. His father still makes some management decisions.

1/ On November 25, 1981, James Wilkett was convicted of second-degree murder by an Oklahoma state court and sentenced to a 15-year prison term to be served consecutively with his previous sentence. Wilkett's conviction is on appeal.

Wilkett Trucking has operated in interstate commerce since 1978 and there is no evidence of record to show any violations of transportation laws or regulations.

Further, two shippers testified to the dependable service they had received from Wilkett Trucking. Other witnesses testified to the carrier's good business reputation and the personal fitness of Wilkett's family. No evidence of James D. Wilkett's personal fitness was presented. Finally, evidence was adduced that Wilkett Trucking has hired a supervisor (a former Commission employee) to inform the company of DOT safety regulations and ICC accounting regulations.

The issue presented by this proceeding is whether the conviction of a trucking company's president and sole proprietor for murder and drug offenses justifies finding the company unfit to receive an ICC license. In the prior decision, the entire Commission noted that the applicant and Wilkett Trucking are, legally speaking, one and the same person. The Commission concluded that applicant's fitness could not be separated from that of Wilkett Trucking, and found that applicant's recent murder conviction indicated such a basic disregard of human values that it was unlikely that applicant's motor carrier operations would be conducted with any greater respect for the laws and regulations applicable to such carriers. On this basis, applicant was found unfit and the request for authority was denied. We have reopened the proceeding to provide a more complete explanation of our decision to deny the authority sought.

Specifically, at issue here is applicant's fitness, willingness, and ability "to comply with this subtitle and regulations of the Commission;" see 49 U.S.C. 10922(b)(1)(A). Each applicant has the affirmative burden of proving its fitness each time it seeks authority from this Commission. An applicant's past misconduct is an element to be considered in determining its fitness to the extent that misconduct relates to the carrier's present and prospective ability to comply with the Interstate Commerce Act and the Commission's regulations. A denial on fitness grounds is not intended to be punitive in nature, but is warranted to protect members of the public from continuing misconduct by the carrier, and evidence of a carrier's willingness to correct past mistakes should be considered in making a determination of an applicant's fitness.

While we recognize that applicant is presently incarcerated, and does not exercise complete dominion over the operations of Wilkett Trucking, we note that applicant, in his appeal of the

initial decision in this matter, concedes that his fitness and that of his trucking company cannot be separated from each other. Certainly, applicant as the sole proprietor of Wilkett Trucking has the legal power to control the operations of Wilkett Trucking whether or not that power is fully exercised, see 49 U.S.C. 10102(6). Under the circumstances, we affirm the prior conclusion that applicant's fitness and that of Wilkett Trucking are inseparable. Applicant's willingness to commit the felonies he has been convicted of is certainly a sound basis for concluding he would also be willing to commit the lesser offenses proscribed by statutes administered by this Commission.

While there is no evidence that Wilkett Trucking has operated in violation of the Commission's licensing requirements or its regulations, and it has hired a regulatory compliance supervisor to assure continued compliance with these laws and regulations, we conclude that this evidence is insufficient to rebut the presumption of unfitness raised by applicant's felony convictions.

Applicant appears, on this record, to be a person who is willing to comply with present licensing and operation requirements because these requirements are not overly onerous. His narcotics and murder convictions reveal that applicant is also willing to disregard laws designed to protect the most basic of human values when it is convenient for him to do so. Moreover, because applicant is already in prison, and seems likely to remain there for a considerable time, the civil and criminal penalties that help us enforce our Act and regulations seem likely to have far less of a deterrent effect on applicant than they would on someone not presently incarcerated. Applicant's past actions lead us to believe that applicant would be perfectly willing to conduct illegal transportation operations in the future if he should find it in his interest to do so.

At bottom, we must balance what we see as a genuine risk of future noncompliance against applicant's assurances that he will conduct his operations lawfully. Given applicant's demonstrated inability to live within the law, we believe the public interest in authorizing new authority only to those applicants demonstrating fitness to hold it requires a denial in this instance. Accordingly, we affirm our prior decision finding applicant unfit.

We find:

Applicant has failed to demonstrate that he is fit to conduct the proposed operation.

It is ordered:

The prior decision of February 23, 1982, in this proceeding, to the extent inconsistent with this decision, is vacated and set aside.

The application is denied.

This decision will take effect 25 days from its date of service.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison. Commissioner Andre dissented. Vice Chairman Gilliam did not participate.

(SEAL)

Agatha L. Mergenovich
Secretary

Notice: This proceeding is now administratively final within the meaning of 49 CFR 1101.2(f) of the Commission's regulations; and, in accordance with the provisions of Section 558(c) of the Administrative Procedure Act, any corresponding temporary authority expires and operations thereunder must cease upon the effective date of this decision, except that to the extent permanent authority is granted in this proceeding (and if partial, only to that extent) the corresponding temporary authority or portion thereof will continue in effect until a certificate or permit is issued and becomes effective. The filing of any further pleadings in this matter will not stay the expiration of the temporary authority related to the denied portion of the sought permanent authority.